2006

# The State of Utah v. Raul Roberto Carrillo : Brief of Appellant

Utah Court of Appeals


Mark L. Shurtleff; attorney general; Attorneys for Appellee.
Debra M. Nelson, Marie Maxwell; Salt Lake Legal Defender Assoc.; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

| | | |
|---|---|---|
| THE STATE OF UTAH, | : | |
| Plaintiff/Appellee, | : | |
| v. | : | |
| RAUL ROBERTO CARRILLO, | : | Case No. 20060766-CA |
| Defendant/Appellant. | : | |

# BRIEF OF APPELLANT

Appeal from a final judgment of conviction for Manslaughter, a second degree felony, in violation of Utah Code Ann. § 76-5-205 (2003), entered by the Honorable Deno Himonas, Third District Court, Salt Lake County, Utah. Appellant is incarcerated.

DEBRA M. NELSON (9176)
MARIE MAXWELL (8672)
**SALT LAKE LEGAL DEFENDER ASSOC.**
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Attorneys for Defendant/Appellant

Assistant Attorney General
MARK L. SHURTLEFF (4666)
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854
Attorneys for Plaintiff/Appellee

IN THE UTAH COURT OF APPEALS

| | | |
|---|---|---|
| THE STATE OF UTAH, | : | |
| Plaintiff/Appellee, | : | |
| v. | : | |
| RAUL ROBERTO CARRILLO, | : | Case No. 20060766-CA |
| Defendant/Appellant. | : | |

# BRIEF OF APPELLANT

Appeal from a final judgment of conviction for Manslaughter, a second degree felony, in violation of Utah Code Ann. § 76-5-205 (2003), entered by the Honorable Deno Himonas, Third District Court, Salt Lake County, Utah. Appellant is incarcerated.

DEBRA M. NELSON (9176)
MARIE MAXWELL (8672)
**SALT LAKE LEGAL DEFENDER ASSOC.**
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Attorneys for Defendant/Appellant

Assistant Attorney General
MARK L. SHURTLEFF (4666)
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854
Attorneys for Plaintiff/Appellee

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

### Cases



### Statutes

IN THE UTAH COURT OF APPEALS

| | | |
|---|---|---|
| THE STATE OF UTAH, | : | |
| Plaintiff/Appellee, | : | |
| v. | : | |
| RAUL ROBERTO CARRILLO, | : | Case No. 20060766-CA |
| Defendant/Appellant. | : | |

## JURISDICTIONAL STATEMENT

Appellant/Defendant Raul Roberto Carrillo (Carrillo) appeals from a final judgment of conviction for Manslaughter, a second degree felony, in violation of Utah Code Ann. § 76-5-205 (2003), entered by the Honorable Deno Himonas, Third District Court, Salt Lake County, Utah. This Court has jurisdiction over criminal convictions other than first degree felonies. Utah Code Ann. § 78-2a-3(e) (2002). A copy of the judgment is in Addendum A.

## STATEMENT OF THE ISSUE, STANDARD OF REVIEW, PRESERVATION

Issue: Whether the evidence sufficiently supports the trial court's finding of recklessness for a conviction of manslaughter?

Standard of Review: The verdict in a bench trial is reviewed for clear error. State v. Walker, 743 P.2d 191-3 (Utah 1987).

Preservation. This issue was preserved below. R. 201:195.

## TEXT OF RELEVANT STATUTES

The text of the following statutes are in Addendum B:

Utah Code Ann. § 76-2-103 (2003);
Utah Code Ann. § 76-5-205 (2003).

## STATEMENT OF THE CASE

On September 23, 2004, an Information was filed against Mr. Carrillo for murder, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (2003). R. 1-4. On January 5, 2005, a preliminary hearing was held and the trial court bound the case over for trial. R. 37-38; 200. The state filed an amended information charging murder or in the alternative aggravated assault, a second degree felony, in violation of Utah Code Ann. § 76-5-103. R. 39-40. On October 13, 2005, the state filed an amended information charging Mr. Carrillo with one count of aggravated assault. R. 56-57. That same day, Mr. Carrillo, entered a guilty plea to aggravated assault before Judge Deno Himonas. R. 58-66. Sentencing was set for December 22, 2005 but was postponed due to the victim's mother objecting to the plea agreement and allegations made by her regarding the agreement. R. 67, 98.

On January 4, 2006, the trial court held a hearing regarding the accuracy of the factual statements offered in support of Mr. Carrillo's plea. R. 98-102. Mr. Carrillo withdrew his plea to aggravated assault. R. 100, 104. On January 27, 2006, Mr. Carrillo entered a not guilty plea to murder charges. R. 117. On May 8, 2006, Mr. Carrillo waived his right to trial by jury. R. 153-154; 201:5-11. On May 10, 2006, the trial court

found Mr. Carrillo guilty of manslaughter, a second degree felony. R. 169-170; 201:265. On July 20, 2006, Mr. Carrillo was sentenced to an indeterminate term of 1-15 years in the Utah State Prison, to run consecutively with any other sentence he is serving. R. 187-88. A notice of appeal was filed on August 18, 2006. R. 189-190.

## STATEMENT OF THE FACT

The state prosecuted Raul Carrillo ("Mr. Carrillo") for the death of Daniel Johnson. The following evidence was presented. On September 17, 2004, Daniel Johnson, the 18 year old victim, picked up his 16 year old girlfriend, Chelsea Stout, to go to a party at the apartment of Simon Apodaca and Daniel Pacheco. R. 201:14, 17, 108, 113-114, 141. The apartment where the party was held was located at 2640 South Windsor Circle. R. 200:14, 17, 30, 32, 113.

Before going to the party, Daniel and Chelsea went to the liquor store with an adult individual who bought them alcohol. R. 201:142. Daniel and Chelsea were the first to arrive at the party. R. 201:143. Apodaca also called other friends to invite them over to the apartment, including Mr. Carrillo and his brother Alejandro Carrillo (Alex). R. 201:18, 115, 145. Two other individuals arrived at the apartment who Apodaca did not know: Allen Sienna, described as a Pacific Islander and Justin Shelton. R. 201:18, 121. Everyone was drinking, conversing, playing games and watching television. R. 201:18, 116. Daniel and Chelsea were with Mr. Carrillo at the party over a period of several hours. R. 201:184.

Chelsea Stout, the state's key witness, testified that over the course of four or five hours she had five shots of brandy, two beers and was using cocaine. R. 201:116, 120, 121, 153. Daniel Johnson was also drinking shots of brandy and using cocaine. R. 201:118, 120. At some point during the evening, Chelsea had a conversation with Mr. Carrillo about their tattoos. R. 201:117, 184.

Sometime later, Apodaca told Allen Sienna that he needed to leave because he was being disrespectful by knocking things over and spilling his beer. R. 201:18, 122, 146. Apodaca told Sienna to take Shelton with him. Id. Sienna made a call from his cell phone and the two individuals left the apartment. R. 201:18, 122, 146. A little while later there was a knock at the door. R. 201:18, 123, 146-47. Chelsea testified that she opened the door and there were five "Tongan guys" standing at the door. R. 201:123, 146-47. One of the guys at the door grabbed Chelsea's face and pushed her down. R. 201:124, 148. After she got up, she saw Daniel Johnson walking out the front door. R. 201:124, 148-49.

Chelsea remembered that Daniel had left his keys in the back room, so Chelsea went to get them and testified that she jumped out the back window alone. R. 201:124, 128, 151. However, in her interview with Salt Lake City Detective Cordon Parks hours after the stabbing, Chelsea stated that there were two women that crawled through the bedroom window with her. R. 201:199-200. Before Chelsea left the house, the Tongans had come into the apartment and started fighting with the people at the party. R. 201:125; Exhibit 3. The fighting spilled over into the outside of the apartment and chaos ensued.

R. 200:29-31; Exhibit 3. A neighbor called police to report the fighting. R. 201:19. Chelsea saw Alex Carrillo fighting one of the Tongans. R. 201:127. She remembered someone screaming that someone had a knife but she could not tell whether anyone actually had a knife. R. 201:127, 181.

After Chelsea jumped out the window, she saw Daniel on top of the parking stall roof. R. 201:128, 151. Daniel was lying flat on top of the roof and called Chelsea's name. R. 201:151. Daniel told her to get into his car and start it. R. 201:128, 151. Chelsea testified that she got into Daniel's car and Daniel jumped down from the roof and got into the passenger's side. R. 201:130. Chelsea testified that only she and Daniel were in the car. R. 201:153. However, Chelsea told Detective Parks that the two women who jumped out of the window with her got into the vehicle with her and Daniel. R. 201:200. Chelsea drove out into the road to leave but Daniel told her to get out and look for his cell phone that was somewhere on the ground. R. 201:130, 131, 152.

Chelsea testified that she got out of the car, closed the door and went around the back of the car towards the entrance of the parking lot to look for the cell phone. R. 201:131, 152. She heard the driver's side door open and she looked over towards the car and saw that Daniel had climbed into the driver's side. R. 201:131, 152, 155, 189. Chelsea saw Daniel sitting with his legs hanging out of the driver's side. R. 201:132. Chelsea testified that she saw Mr. Carrillo standing over Daniel, hitting him. R. 201:132, 156. Chelsea then saw Alex, Mr. Carrillo's brother, walk over to Mr. Carrillo and hand

him something but couldn't see what it was. R. 201:132,137,157, 190.

Chelsea told Detective Parks hours after the stabbing that "King Joker" stabbed Daniel and she believed his name was Gabriel. R. 201:197, 199, 204. However at trial, Chelsea testified that she saw Mr. Carrillo stab Daniel in the leg with a blue-handled butterfly knife. R. 201:132-33, 137, 191, 206. Chelsea identified Raul in a photo line-up as the individual who stabbed Daniel. R. 201:42-44, 206. Chelsea also described the person who stabbed Daniel as the person she spoke to at the party who had a tattoo of the word "Joker" on his right lower arm. R. 201:46. Mr. Carrillo has a tattoo of the word "Joker" on his right forearm. R. 201:46.

After Chelsea saw Daniel being stabbed, she ran over and starting hitting Mr. Carrillo in the face. R. 201:133, 157. Chelsea testified that Mr. Carrillo hit her and she "kind of blacked out and . . . felt people kicking my ribs and hitting [her]." R. 201:134,157-58. However, at the preliminary hearing Chelsea testified that she was knocked out by a Tongan guy. R. 200:17-18; 201:182-83. When Chelsea came to, she testified that she was hit by the side of a car as she walked to get out of the road. R. 201:134. However, Chelsea had told Detective Parks that when she came to she was sitting inside the apartment. R. 201:200. After Chelsea came to, she realized Daniel had driven away without her. R. 201:159. Police officers then arrived on the scene and she made a statement about what had happened. R. 201:134, 160. In her statement, Chelsea did not mention that Daniel had been stabbed or needed medical attention. R. 201:59,

162-64, 168.

Officer Eric Densley and Officer Jason Burnham, South Salt Lake Police Department, were dispatched along with several other officers at 5:07 to the home of Daniel Johnson's mother at 247 East Southgate Avenue. R. 201:80-81; 200:44-45. Office Burnham was the first to arrive on the scene. R. 200:48. When Officer Densley and Burnham arrived they saw that Daniel's car had hit the side of the house and Daniel was lying on the front lawn and his pant legs were soaked entirely in blood. R. 201:81, 89; 200:45-46. Daniel's brother was next to him. R. 201:81, 89; 200:45. The officers could see large amounts of blood and asked what had happened. R. 201:81; 200:46. Daniel told Officer Burnham that "he was stabbed by a big Polynesian." R. 200:51. Daniel asked for help and was moaning that he was hurting. R. 201:81; 200:46. Officer Burnham could see blood squirting from Daniel's left leg when he lifted it but couldn't tell where the injury was located. R. 200:49. Officer Burnham told Daniel to "wait until medical attention arrived." R. 200:46. Officer Burnham told Daniel's brother to calm down and hold Daniel "and just wait until medical arrived, because they were on their way." R. 200:46.

Officer Densley went and looked inside the vehicle and "saw a large amount of blood inside the car, on the floorboards, the driver's side." R. 201:82. Officer Densley testified that there "lots of blood" inside the car "about a quarter inch or half inch" amount of blood on the floor of the car. R. 201:86. The officer also observed blood on

the front lawn. R. 201:84. Officer Densley did not think the blood observed was the result of a car accident. R. 201:82. Although officers are trained in first aid, Officer Densly testified that he did not render first aid to Daniel nor did any other officer prior to the paramedics arriving. R. 201:50, 82, 90; 200:49-50. Instead, Officer Burnham told Daniel's brother "to push [Daniel's] leg down" keeping "it towards the ground." R. 200:49. Officer Densley testified that he was present when Daniel told Officer Burnham that "[t]he Poly's" had stabbed him. R. 201:86, 89; 200:46. In his report, Officer Densley wrote "They wouldn't give me any names. Daniel told him, 'A big Polynesian stabbed me.'" R. 201:90.

The medical examiner, Todd Cameron Grey, determined that Daniel died as a result of "exsanguination, in other words bleeding to death, resulting from a stab wound of the left leg." R. 201:94. The stab wound on Daniel's leg was about 5 or 6 inches above his left knee and a little over a centimeter in length and three and a half inches deep. R. 201:95, 97, 107. The knife struck "a major branch of the femoral artery, which is the main artery which provides blood to the leg." R. 201:97. This type of injury continues to leak blood with "every beat of the heart" until it is closed off. R. 201:97. Daniel's artery was only partially transected which prevented it from "self sealing." R. 201:102. According to the examiner, a wound such as this one "would not be an immediately lethal injury" but "would be a slowly evolving problem." R. 201:105. The examiner testified that the pictures of Daniel's car and front law show a "pretty

significant extent of blood loss." R. 201:99. The medical examiner testified that the lack of medical help from the time between when 911 was called until medical help arrived, as in this case, "would certainly have contributed to the deterioration in [a person's] condition." R. 201:105-06, 110-11. According to the medical examiner if Daniel had received first aid it would have "retarded the progression of his demise." R. 201:108. The medical examiner testified that "the sooner this individual received adequate care, the greater the likelihood he would have survived." R. 201:105, 108.

On September 21, 2004, Detective Parks interviewed Mr. Carrillo about the events that occurred in the early morning hours of September 18, 2004. R. 201:35. Throughout the interview, Mr. Carrillo maintained that he did not have a knife or stab anyone. R. 201:39; Exhibit 3. The detective continued to tell Mr. Carrillo that he did have a knife and several witnesses saw him stab Daniel. Exhibit 3. Mr. Carrillo maintained that he did not remember having a knife or stabbing anyone. Exhibit 3. At one point in the interview, the detective told Mr. Carrillo "We know you had a knife, Come on, you're nearly there for Christ sakes. . . .Ok[ay] stop, you're nearly there. You had a knife right?" Mr. Carrillo responded "I had a knife." The detective continued "There you go. And you stabbed him in the leg, didn't you?" Mr. Carrillo responded "I stabbed him in the leg." Exhibit 3. However, after the interview ended, Mr. Carrillo again stated "I didn't know if I had a knife or not" and talks about how he is a fighter not a stabber. R. 201:39.

The trial court found that the evidence proved beyond a reasonable doubt that Mr.

Carrillo stabbed Daniel Johnson in the left thigh. R. 201:264. The "stab wound partially transected a significant branch of [Daniel's] femoral artery, and caused [him] to bleed to death." R. 201:264. The court determined Raul "recklessly caused the death of Daniel Johnson" and found him guilty of manslaughter. R. 201:265. The trial court declined defense counsel's request that the court put on the record any lesser included offenses it considered. R. 201:261-62.

## SUMMARY OF THE ARGUMENT

The trial court determined that Mr. Carrillo, by stabbing Daniel in the thigh with a small knife and partially transecting a significant branch of his femoral artery, "recklessly caused" Daniel's death and found him guilty of manslaughter. Pursuant to the statutory definition of the term "reckless," the state was required to prove beyond a reasonable doubt that Mr. Carrillo actually knew of the risk of death created by stabbing Daniel in the thigh with a small knife and that he consciously disregarded that risk in order to sustain a conviction for manslaughter. It was also necessary for the state to prove beyond a reasonable doubt that Mr. Carrillo's action of stabbing Daniel in the thigh created a substantial and unjustifiable risk of death. The marshaled evidence was insufficient to support a finding either that Mr. Carrillo actually perceived the risk of death his conduct presented and disregarded it or that it created a substantial and unjustifiable risk of death. The evidence showed that only partially transecting the femoral artery in the leg which prevents it from closing off on its own is unusual. The evidence further supports that this

type of injury is not immediately life threatening and had Daniel received proper medical attention the greater the likelihood he would have survived. Therefore, the trial court's finding that Mr. Carrillo recklessly caused the death of Daniel is clearly erroneous and should be reversed.

## ARGUMENT

### POINT. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING THAT CARRILLO HAD THE REQUIST INTENT NECESSARY TO SUSTAIN A CONVICTION FOR MANSLAUGHTER.

The sufficiency standard requires that if the challenged finding is against the clear weight of the evidence then it should be set aside. When determining whether the finding is clearly erroneous, this Court must consider the standard of proof the state was required to meet. Under the beyond a reasonable doubt standard, it is not as difficult for Mr. Carrillo to show that the challenged finding was clearly erroneous as it would be if the standard were less exacting. See In re Z.D., 2006 UT 54, ¶40, 561 Utah Adv. Rep. 10. The offense of manslaughter required the state to prove beyond a reasonable doubt that Mr. Carrillo recklessly caused the death of Daniel as that term is defined by statute. The marshaled evidence is this case failed to prove that Mr. Carrillo knew that stabbing Daniel in the thigh with a small knife created a substantial and unjustifiable risk of death and that he consciously disregarded that risk. Therefore, the trial court's finding is clearly erroneous and should be reversed.

A. THE SUFFICIENCY STANDARD

Carrillo was convicted of manslaughter, a second degree felony offense under Utah Code Ann. § 76-5-205. The case was tried to the bench. Carrillo maintains that the evidence at trial was insufficient to support the conviction. In considering a sufficiency claim after a bench trial, the Supreme Court has "provided sound guidance to appellate courts regarding the scope of their authority to review factual findings under the clearly erroneous standard of rule 52(a) in State v. Walker, 743 P.2d 191 (Utah 1987)." In re Z.D., 2006 UT 54, ¶32.

> [T]he content of [r]ule 52(a)'s clearly erroneous standard, imported from the federal rule, requires that if the findings (or the trial court's verdict in a criminal case) are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings (or verdict) will be set aside.
> . . . .
>
> . . . [I]t is simply unrealistic to expect an appellate court to conduct a review of a sufficiency of the evidence challenge without weighing evidence. The appellate court must, however, go about weighing the evidence with one eye on the scales and the other fixed firmly on its duty of deference to findings of fact. Thus, it may only disturb findings that offend the "clear weight" of the evidence.
> . . . .
>
> It is the role of subsidiary principles, . . . to help make principled distinctions between a belief that a trial court was mistaken and a firm conviction of error. Thus, an appellate court may consider whether the findings were made by a judge or by a jury. This distinction matters. An appellate court must indulge findings of fact made by a jury that support the verdict. No such indulgence is required of findings made by a judge. [The Supreme Court] made this point in Walker in the context of interpreting rule 52(a) when we looked favorably to the position adopted by Wright & Miller concerning federal rule 52(a) . . . that

> "[i]t is not accurate to say that the appellate court takes that view of the evidence that is most favorable to the appellee, that it assumes that all conflicts in the evidence were resolved in his favor, and that he must be given the benefit of all favorable inferences. All of this is true in reviewing a jury verdict. It is not true when it is findings of the court that are being reviewed."

Id. at ¶¶32-35 (citations omitted).

The Supreme Court definition of "clearly erroneous" was adopted from the federal rules as defined in United States v. U.S. Gypsum Co., 333 U.S. 364 (1948). See id. at ¶38. "The Gypsum definition explained that '[a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Id. (quoting Gypsum, 333 U.S. at 395). The importance of this definition is the scope of review in a sufficiency case "encompasses the entire factual record." In re Z.D., 2006 UT 54, ¶39.

Finally, when determining whether a result was "clearly erroneous" it is appropriate "for the reviewing court to consider the standard of proof the prevailing party below was required to meet." Id. at ¶40. When the standard of proof is the "more exacting evidentiary standard" of beyond a reasonable doubt, it is less "difficult to demonstrate that the evidence . . .is so wanting as to be 'clearly erroneous'" than if would be if the standard of proof were less exacting. Id. Still, for an appellate court to reverse, "[t]he result must be against the clear weight of the evidence or leave the appellate court with a firm and definite conviction that a mistake has been made." Id.

Under the clearly erroneous standard in this case, the state failed to present

sufficient evidence to establish that Mr. Carrillo recklessly caused the death of Daniel Johnson. Therefore, he respectfully asks this Court to reverse his conviction for manslaughter.

B. THE CRIME OF MANSLAUGHTER REQUIRES PROOF OF CRIMINAL RECKLESSNESS AS DEFINED UNDER THE STATUTE.

The trial court found Mr. Carrillo guilty of manslaughter determining that he "acted recklessly, . . ., and that he recklessly caused the death of Daniel Johnson." R. 201:265. To support a conviction of manslaughter, the state must prove the following: "Criminal homicide constitutes manslaughter if the actor . . . recklessly causes the death of another." Utah Code Ann. §76-5-205 (2003). Criminal recklessness is defined in Utah law as:

> Recklessly, or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Utah Code Ann. § 76-2-103 (3) (2003).

Criminal recklessness falls between depraved indifference and criminal intent on the one hand, and criminal negligence on the other. On the spectrum of criminal mental states, however, depraved indifference is closely related to criminal recklessness. State v. Standiford, 769 P.2d 254, 263 (Utah 1988) (recognizing historical similarities). Depraved indifference requires the state to prove that defendant acted knowingly in creating a grave

risk of death, and that he knew the risk of death was grave with a high probability of death, and the conduct evidenced utter callousness and indifference toward human life. Id. at 264. Criminal recklessness requires the state to prove that defendant knew his conduct created a substantial risk of death; defendant consciously disregarded that risk. Defendant's disregard must constitute a "gross deviation" from the reasonable standard of care. Id. at 263-64 (stating that the difference between depraved indifference and recklessness is that the former requires a higher risk of death than the latter).

On the other end of the spectrum, criminal negligence requires that a defendant "ought to be aware of a substantial and unjustifiable risk" created by his conduct. Id. Also, if defendant fails to perceive the risk created by his conduct, and the failure is a "gross deviation" from the reasonable standard of care that constitutes criminal negligence. Id; Utah Code Ann. § 76-2-103 (2003). Thus, a defendant may be held criminally liable for negligence when the evidence establishes beyond a reasonable doubt that the conduct created a substantial and unjustifiable risk that the defendant should have perceived, but failed to, and that the "risk is of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care." State v. Warden, 813 P.2d 1146, 1151 (Utah 1991).

The difference between criminal recklessness and criminal negligence is that for recklessness, the defendant actually knew of the risk created by his conduct, while for negligence, he "should have been" aware of the risk, but was not. See Standiford, 769

P.2d at 267; State v. Howard, 597 P.2d 878, 881 (Utah 1979) (ruling that the difference between recklessness and criminal negligence is whether defendant "was a*ware, but consciously disregarded* a substantial risk" for recklessness; and whether defendant "was u*naware but ought to have been aware* of a substantial risk" for negligence) (emphasis added); State v. Sherard, 818 P.2d 554, 560 (Utah Ct. App. 1991) (ruling that the difference between recklessness and negligence is that defendant was actually aware of the risk of death for the former, while he was not, but should have been aware of such risk for the latter); State v. Dyer, 671 P.2d 142, 148 (Utah 1983); State v. Robinson, 2003 UT App 1, ¶6 n.2, 63 P.3d 105.

Thus, the crime of reckless manslaughter requires proof that the defendant "cause[d] a death by engaging in conduct which the actor kn[ew] create[d] a 'substantial and unjustifiable risk' of death," and that defendant's actions in disregarding that risk constituted "'a gross deviation' from the standard of care exercised by an ordinary person." Standiford, 769 P.2d at 263, 267. To be clear, "reckless" as used in its "colloquial sense" will not suffice; "the definition of 'reckless' that [the court is] bound to follow—the definition set forth in Utah Code Ann. § 76-2-103(3)[]—is narrower." Robinson, 2003 UT App 1, ¶10 n.3.

In Robinson, this Court ruled that the evidence was insufficient to support a bindover for criminal recklessness. There, defendant and the victim were drinking beer and examining defendant's handgun. When the victim activated the slide, the defendant

took the gun from her, noticed it was jammed, and ejected a bullet from the gun. The defendant than put the bullet back into the clip and the gun fired hitting the victim just below her left ear. She died. Id. at ¶2.

In assessing whether defendant acted recklessly, this Court specified that the inquiry involves both "objective and subjective elements." Id. at ¶6 (citation omitted).

> Two subjective elements of the definition are whether the person actually perceived the risk that his or her actions presented and whether he or she consciously disregarded it. [] See State v. Howard, 597 P.2d 878, 881 (Utah 1979) (recognizing that whether an actor perceived and disregarded a risk "is purely [a question] of subjective intent in the mind of the actor"); State v. Martinez, 2000 UT App 320, ¶12 n.5, 14 P.3d 114 ("Liability for criminal recklessness . . . requires actual knowledge or awareness and thus turns on the defendant's subjective mental state.") (citations omitted), aff'd, 2002 UT 80, 52 P.3d 1276. The magnitude of the risk itself, on the other hand, is an objective matter. See Wessendorf, 777 P.2d at 526 ("The statutory language includes application of an objective standard, i.e., that 'the risk in both cases must be of such a degree that an ordinary person would not disregard or fail to recognize it.'") (quoting State v. Dyer, 671 P.2d 142, 148 (Utah 1983)).

Robinson, 2003 UT App 1, ¶6; see also id at n.2 ("the determination to be made is whether the defendant was subjectively 'aware of but consciously disregarded' the risk his actions posed") (citation omitted). This Court found that while the defendant contributed to the victim's death, the evidence failed to support that he acted with criminal recklessness. Id. at ¶7.

Applying the law set forth above, the marshaled evidence here fails to support a finding beyond a reasonable doubt that Carrillo recklessly caused the death of Daniel Johnson. Therefore, the conviction for manslaughter must be reversed.

C. THE MARSHALED EVIDENCE IS INSUFFICIENT TO SUPPORT BEYOND A REASONABLE DOUBT THAT DEFENDANT RECKLESSLY CAUSED THE DEATH OF DANIEL JOHNSON.

At the close of the state's case in this matter, the defense made a motion to dismiss based on the insufficiency of the evidence which was denied by the trial court. R. 201:195. The marshaled evidence is as follows: On September 17, 2004, Mr. Carrillo attended a party along with 10-12 other individuals including Daniel Johnson and his girlfriend Chelsea Stout. R. 201:14-18, 113-115, 141-145. Everyone was drinking, conversing, playing games and watching television. R. 201:18, 116. The party continued over a period of several hours. R. 201:184.

At some point, Allen Sienna, a Pacific Islander, was asked to leave the party because he was being disrespectful by knocking things over and spilling beer. R. 201:18, 122, 146. After making a call from his cell phone, Sienna left. R. 201:18, 122, 146. Later, five "Tongan guys" showed up at the apartment and forced there way inside. R. 201:123-25, 148-49. Daniel Johnson walked out the front door as the "Tongan" entered the apartment. R. 201:124, 148-49; Exhibit 3. A fight broke out between the "Tongans" and the people attending the party. R. 201:125; Exhibit 3. The fighting spilled over into the outside of the apartment and chaos ensued. R. 200:29-30; Exhibit 3. The neighbor made a 911 call at 4:59 to report the fighting. R. 201:19.

After Chelsea had retrieved Daniel's keys from the backroom and jumped out the back window of the apartment, she got into Daniel's car and started it. R. 201:124, 128,

151. Daniel, who was on the top of a parking stall roof, jumped down and got into the passenger side of his car. R. 201:130, 152. Chelsea drove out into the road to leave but Daniel told her he had lost his cell phone on the ground somewhere and asked her to go look for it. R. 201:130-131, 152. Chelsea got out of the car, closed the door and went towards the entrance of the parking lot to look for Daniel's cell phone. R. 201:131, 152. Daniel then climbed over into the driver's seat. R. 201:131, 152, 155, 189.

As the fighting and general confusion continued outside, Mr. Carrillo heard someone from inside a car say something to him and as he looked inside the car to hear what was being said, the driver hit him in the face. Exhibit 3. Chelsea saw Mr. Carrillo standing over Daniel, hitting him. R. 201:132, 156. Chelsea then saw Alex, Mr. Carrillo's brother, walk over to Mr. Carrillo and hand him something but couldn't see what it was. R. 201:132, 137, 157, 190. Chelsea testified that she then saw Mr. Carrillo stab Daniel in the leg with a blue-handled butterfly knife. R. 201:132-33, 137, 191, 206.

Daniel drove to his mother's home a few blocks away, hitting the side of her house. R. 201:16, 80-81, 89, 111. Officers were dispatched at 5:07 to the home at 247 East Southgate Avenue. R. 201:80-81; 200:44-45. When Officer Densley and Burnham arrived they saw that Daniel's car had hit the side of the house and Daniel was lying on the front lawn and his entire pant legs were soaked in blood. R. 201:81, 89; 200:45-46. Daniel's brother was next to him. R. 201:81, 89; 200:45. The officers could see large amounts of blood and asked what had happened. R. 201:81; 200:46. Daniel told Officer

Burnham that "he was stabbed by a big Polynesian." R. 200:51. Daniel asked for help and was moaning that he was hurting. R. 201:81; 200:46. Officer Burnham could see blood squirting from Daniel's left leg when he lifted it but couldn't tell where the injury was located. R. 200:49. Officer Burnham told Daniel to "wait until medical attention arrived." R. 200:46. Officer Burnham told Daniel's brother to calm down and hold Daniel "and just wait until medical arrived, because they were on their way." R. 200:46.

Officer Densley went and looked inside the vehicle and "saw a large amount of blood inside the car, on the floorboards, the driver's side." R. 201:82. Officer Densley testified that there "lots of blood" inside the car "about a quarter inch or half inch" amount of blood on the floor of the car. R. 201:86. The officers also observed blood on the front lawn. R. 201:84; 200:44-46. Officer Densley did not think the blood observed was the result of a car accident. R. 201:82. The officer testified that he did not render first aid to Daniel nor did any other trained officer prior to the paramedics arriving. R. 201:82, 90; 200:49-50. Paramedics arrived on the scene about 5:15 a.m. R. 201:22.

The medical examiner determined that Daniel died from bleeding to death as a result from a single stab wound to his left leg. R. 201:94, 100. The stab wound on Daniel's leg was about 5 or 6 inches above his left knee and a little over a centimeter in length and three and a half inches deep. R. 201:95, 97, 107. The knife struck "a major branch of the femoral artery, which is the main artery which provides blood to the leg." R. 201:97. Daniel's artery was only partially transected which prevented it from "self

sealing." R. 201:102. A partially transected artery would not be putting out large amounts of blood so it would not be immediately lethal but a "slowly evolving problem." R. 201:105. This type of injury continues to leak blood with "every beat of the heart" until it is closed off. R. 201:97.

The examiner testified that the pictures of Daniel's car and front lawn show a "pretty significant extent of blood loss." R. 201:99. The effects of not receiving medical help when losing blood is that the body goes into shock. R. 201:98. The medical examiner testified that the lack of medical help from the time between when 911 was called until medical help arrived, as in this case, "would certainly have contributed to the deterioration in [a person's] condition." R. 201:105-06, 110-11. According to the medical examiner if Daniel had received first aid it would have "retarded the progression of his demise." R. 201:108. The medical examiner agreed that the sooner first aid had been applied the greater likelihood Daniel would have survived. R. 201:105, 108.

In considering whether the evidence was sufficient to support the crime of reckless manslaughter, the inquiry involves both "objective and subjective elements." Robinson, 2003 UT App 1, ¶6. The two subjective elements are (1) whether Mr. Carrillo "actually perceived the risk [of death] that his . . . actions presented" and (2) whether he "consciously disregarded it." Id. In this case, the evidence does not support beyond a reasonable doubt that Mr. Carrillo actually knew and consciously disregarded the knowledge that stabbing someone in the thigh with a small knife could result in death.

Standiford, 769 P.2d at 267 ("The sole difference between reckless manslaughter and negligent homicide is whether the defendant actually knew of the risk of death or simply was not, but should have been, aware.").

No evidence was presented that Mr. Carrillo had any knowledge that a major artery flows through this leg and that by stabbing an individual with a small knife the artery can be partially transected. And that by only partially cutting that artery, the wound could not seal itself off as it would if it had been completely severed. R. 201:102. Even the police officers on the scene who are trained in rendering first aid apparently did not recognize the seriousness of a stab wound to the thigh even in the face of so much blood loss because no medical aid was given by them although the victim had asked for help and was bleeding profusely. R. 201: 81, 89; 200:45-46, 49.

In fact, the evidence showed that this type of injury is not immediately life threatening. It is a wound that was slow bleeding and with the proper medical given early on would have "retarded the progression of [Daniel's] demise." R. 201:108. To the extent that Mr. Carrillo should have been aware that his conduct created a substantial and unjustifiable risk of death to Daniel, he was not actually aware of such risk. State v. Martinez, 2000 UT App 320, ¶12 n.5, 14 P.3d 114 ("[L]iability for criminal recklessness . . . require[s] actual knowledge or awareness and thus turn[s] on the defendant's subjective mental state.") (citation omitted). Unawareness of risk constitutes criminal negligence. Negligence is insufficient to support criminal recklessness. See Warden, 813 P.2d at

1151 (for criminal negligence, a defendant may be held liable when the evidence establishes beyond a reasonable doubt that the conduct created a substantial and unjustifiable risk, that the defendant should have perceived the risk but failed to do so, and "that the risk is of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care"); Howard, 597 P.2d at 881 (ruling that the difference between recklessness and criminal negligence is whether defendant "was a*ware, but consciously disregarded* a substantial risk," or whether defendant "was u*naware but ought to have been aware* of a substantial risk") (emphasis added).

While it may be argued that anyone who stabs another individual in any part of the body is reckless as that term is defined "in its colloquial sense," this Court is bound by the statutory definition of the term "reckless." See Robinson, 2003 UT App 1, ¶10 n.3 (stating that "'reckless' in its colloquial sense" will not suffice; "the definition of 'reckless' that we are bound to follow" "is narrower").

Next, the objective component of criminal recklessness considers the magnitude of the risk. Id. at ¶6. To support a conviction for manslaughter, the state was required to prove beyond a reasonable doubt that Mr. Carrillo's action of stabbing Daniel in the thigh created a "substantial and unjustifiable" risk of death. Utah Code Ann. §76-2-103 (3). The objective component requires the magnitude of the risk of death "be of such a degree that an ordinary person would not disregard or fail to recognize it." State v. Wessendorf, 777 P.2d 523, 526 (Utah Ct. App. 1989) (citation omitted).

The evidence on this point is to the contrary. The evidence shows that the wound to the thigh was made with a small knife. R. 201:101. If the artery in Daniel's leg had been completely transected it would have created "somewhat of a self sealing of the artery." R. 201:102, 106. However, the artery was only partially transected which prevented it from "pulling back and self sealing," instead it bled "more copiously." R. 201:102, 106. Still, the evidence was that this type of injury is "slow[] evolving" and not "immediately lethal." R. 201:105. Had Daniel received first aid from the trained officers by way of "pressure . . . somewhere where the vessel is bleeding" . . . the greater the likelihood he would have survived." R. 201:104-05. In fact, according to the evidence, "[f]irst aid would have . . . retarded the progression of his demise. R. 201:108. Instead, the minutes that passed between when 911 was called, to when officer arrived on the scene, to when emergency medical help arrived and finally began treatment . . . "contributed to the deterioration in [Daniel's] condition." R. 201:105-06.

As defense counsel pointed out in his closing, a stab wound in the thigh is not the type of injury where death is a substantial risk. R. 201:234-35. This was not a stab wound to the heart, chest, neck or abdomen or done multiple times where there is a substantial and unjustifiable risk of death. This single stab wound was unique in that it hit a major artery in the leg, and only partially transected it, preventing it from closing itself off. Next, the lack of first aid administered by police officers trained in first aid added to an otherwise non-lethal injury. It can only be presumed that the police officers themselves

on the scene of the accident, witnessing the large amount of blood loss and blood spurting from Daniel's thigh did not believe a stab wound to the thigh was serious enough to render first aid.

The evidence does not support beyond a reasonable doubt that Mr. Carrillo actually knew and consciously disregarded the knowledge that stabbing someone in the thigh with a small knife could result in death. Nor does the evidence support beyond a reasonable doubt that Mr. Carrillo's action of stabbing Daniel in the thigh created a "substantial and unjustifiable" risk of death. Therefore, the trial court's finding that Mr. Carrillo recklessly caused the death of Daniel is clearly erroneous and should be reversed.

## CONCLUSION

The Appellant, Mr. Carrillo, respectfully requests this Court to reverse his conviction for manslaughter.

SUBMITTED this 12 day of January, 2007.

DEBRA M. NELSON
MARIE MAXWELL
Attorneys for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, DEBRA M. NELSON, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 17 day of January, 2007.

DEBRA M. NELSON

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____day of January, 2007.

# ADDENDUM A

3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

| | | |
|---|---|---|
| STATE OF UTAH,<br>Plaintiff, | : | MINUTES<br>SENTENCE, JUDGMENT, COMMITMENT |
| vs. | : | Case No: 041906193 FS |
| RAUL ROBERTO CARRILLO,<br>Defendant. | : | Judge: DENO HIMONAS<br>Date: July 20, 2006 |

PRESENT
Clerk: patj
Prosecutor: HALL, JEFFREY W
Defendant
Defendant's Attorney(s): ROBERT K HEINEMAN
MARIE E MAXWELL

DEFENDANT INFORMATION
Date of birth: September 29, 1982
Video
Tape Count: 11.13

CHARGES

1. MANSLAUGHTER (amended) - 2nd Degree Felony
Plea: Not Guilty - Disposition: 05/10/2006 Guilty

SENTENCE PRISON

Based on the defendant's conviction of MANSLAUGHTER a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

Case No: 041906193
Date: Jul 20, 2006

---

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

This case is to run consecutively with any other sentence deft is serving

Commitment is to begin immediately.

Dated this 20 day of July, 2006.

DENO HIMONAS
District Court Judge

# ADDENDUM B

# UTAH CODE ANN. § 76-2-103 (2003)

## 76-2-103. Definitions.

A person engages in conduct:

(1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

(2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(3) Recklessly, or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

# UTAH CODE ANN. § 76-5-205 (2003)

## 76-5-205. Manslaughter.

(1) Criminal homicide constitutes manslaughter if the actor:

(a) recklessly causes the death of another;

(b) commits a homicide which would be murder, but the offense is reduced pursuant to Subsection 76-5-203(4); or

(c) commits murder, but special mitigation is established under Section 76-5-205.5.

(2) Manslaughter is a felony of the second degree.